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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 465

AIR TRANSPORT ASSOCIATES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 1100) is reported at 199 F. 2d 181. The orders and findings of the Civil Aeronautics Board (R. 15, 32) are not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 10, 1952 (R. 1110), and a petition

for rehearing was denied by that Court on October 3, 1952 (R. 1143). The petition for a writ of certiorari was filed on November 25, 1952. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

QUESTIONS PRESENTED

Petitioner operates as an air carrier by virtue of registration with the Civil Aeronautics Board under a regulation of the Board exempting irregular air carriers from the certificate requirements of the Civil Aeronautics Act. The Board has revoked petitioner's Letter of Registration, and the exemption evidenced thereby, upon findings that it has knowingly and willfully violated the Civil Aeronautics Act.

The questions presented are:

1. Whether, as petitioner claims, the Board judged the permissible character of petitioner's activities in the light of standards other than those which existed when petitioner received its Letter of Registration and began its operations.

2. Whether the Board's findings are supported by the record.

3. Whether there was a failure to meet the requirements of Section 9(b) of the Administrative Procedure Act.

4. Whether, in revoking an exemption from the certificate requirements of the Civil Aeronautics Act, the Board is required to follow the statutory procedures applicable to the revocation of a certificate of public convenience and necessity.

5. Whether the Board was required to receive

and consider evidence designed to show that petitioner's operations, although unlawful under the Board's regulations, were nonetheless serving a public need.

STATUTES AND REGULATIONS INVOLVED

Pertinent provisions of the Civil Aeronautics Act and the Administrative Procedure Act are set forth in the Appendix, *infra*, pp. 15 to 18. Applicable regulations of the Civil Aeronautics Board appear in the appendix to the petition for writ of certiorari (pp. 35-59) and at R. 57-63, 345-370.

STATEMENT

Petitioner is a Large Irregular Carrier, *i.e.*, an irregular carrier providing air transportation by means of large transport-type planes.[1] It does not have a certificate of public convenience and necessity, but has been operating, since it came into existence in 1948, pursuant to a regulation, issued under authority of Section 416 of the Civil Aeronautics Act, providing an exemption for persons engaged in "irregular" operations. Petitioner has a Letter of Registration, issued under this regulation on August 13, 1948, which evidences the fact that it availed itself of the exemption privilege.

---

[1] Large Irregular Carriers are permitted to conduct cargo and passenger operations between any points within the United States or within United States territory except Alaska, and between any point in the United States and any point in United States territory including Alaska. Cargo operations are permitted between any points in the world, except between points within Alaska (R. 358). Owing to conditions peculiar to Alaska, operations wholly within the Territory are governed by special regulations (see R. 358).

The regulation in force when petitioner became a carrier [2] defined an Irregular Air Carrier as one which "does not operate, or hold out to the public expressly or by course of conduct that it operates, one or more aircraft between designated points . . . regularly or with a reasonable degree of regularity . . . (14 C.F.R. 292.1(b); R. 358). It stated further (*id.*):

> No air carrier shall be deemed to be an Irregular Air Carrier unless the air transportation services offered and performed by it are of such infrequency as to preclude an implication of a uniform pattern or normal consistency of operation between . . . such designated points.

It also appears that, when petitioner was issued its Letter of Registration, it was advised by a letter of transmittal that the "establishment of frequent service over regular routes" was not authorized

[2] On May 20, 1949, the Board issued a revision of the exemption regulation (14 C.F.R. (1951 Supp.) 291) terminating, as of June 20, 1949, the blanket exemption theretofore granted to large irregular carriers. The revised regulation provided, however, that any such carrier filing an application for individual exemption prior to June 20, 1949, might continue to operate as before until the Board had passed upon its application for exemption, or until its Letter of Registration was revoked or cancelled, "whichever shall be earlier" (14 C.F.R. (1951 Supp.) 291.16). No change was made by this revision in the definition of an irregular air carrier, nor was the scope of operating authority altered in any way. Petitioner made a timely application for individual exemption authority, so that it is authorized to operate to the same extent as authorized by its original exemption until the orders now under review revoking petitioner's Letter of Registration take effect. Its application, along with numerous others, is being heard in a consolidated proceeding before the Board known as *The Investigation of Air Services By Large Irregular Carriers and Irregular Transport Carriers*, Board Docket No. 5132 (R. 51).

(R. 344, 345). Petitioner was also furnished, at the same time, a copy of the underlying regulation and an explanatory statement, prepared by the Board, setting forth the principles by which the carrier should be guided in keeping its operations within the limits of the exemption (R. 345 *et seq.*).

As an additional guide to the industry, the Board issued an interpretative regulation on December 10, 1948. This interpretation sets out specific examples showing what kinds of operation between two given points are permissible and what kinds improper. The interpretation states that it does not "enlarge or contract the scope of operations permitted by the regulation." (R. 57, 58.)

From its inception as a carrier, petitioner chose to concentrate its operations between two points, Anchorage, Alaska and Seattle, Washington. By a series of letters issued in 1949 (R. 371, 389, 400), the Chief of the Board's Office of Enforcement advised petitioner that its operations and its public representations concerning its operations between Anchorage and Seattle were not permissible and that enforcement proceedings would be recommended if violations did not cease (pp. 375, 395, 396, 404). In December 1949, the Board issued an order directing petitioner to show cause why its Letter of Registration should not be revoked for knowing and willful violations of the Act and regulations issued thereunder (R. 71). The matter was assigned for hearing before an examiner and full adjudicatory proceedings followed (R. 1104). Finding that petitioner had held itself out as pro-

viding a regular service between Anchorage and Seattle, and that petitioner had in fact performed a regular operation between those points, the Board concluded that petitioner had engaged in knowing and willful violations (R. 19, 21, 38, 39, 40). It held that its determination was being made solely on the basis of requirements and standards which had been continuously in effect since petitioner received its Letter of Registration (R. 35-37).

Reviewing the administrative proceedings, the Court of Appeals held that "the record is clear that [petitioner] held out a regular Seattle service . . . a clear violation of the Regulation with reference to holding out" (R. 1107; see also 1109). Examining the "detailed findings as to the extent of operations" actually conducted, the court likewise held that the Board had ample support for its conclusion that petitioner had in fact engaged in excessive operations, in knowing and willful violation of law (R. 1107-8).

Commenting on the contention that the Board had applied standards differing from those which were in effect when petitioner first received its Letter, the court stated (R. 1108):

> . . . Associates' arguments in this respect are directed primarily to the point that the Board in fact amended its Regulation by case-by-case "interpretation," by Interpretation No. 1 of December 10, 1948, and by adoption of the 1949 Regulation repealing the blanket exemption, after Associates had made its business investments. The contention is without merit, as in-

dicated by a review of the information which Associates had when it applied for and received its Letter, as we have described hereinabove.

As to the 1949 Regulation, while it did terminate all former blanket exemptions, Associates' operating authority was extended when it filed its application for individual exemption. Moreover, the 1949 Regulation did not establish new criteria for determining whether flights are irregular and infrequent. And, again, the finding of the Board was that Associates' activities were in violation of the standards existing at the time its Letter was issued.

Dealing with petitioner's contention (see Pet. p. 9) that the Board erred in failing to follow the revocation procedures set out in Section 9(b) of the Administrative Procedure Act and Section 401(h) of the Civil Aeronautics Act, the court held (1) that Section 9(b) is in terms inapplicable because the petitioner was charged with *willful* violations, and (2) that the procedures of Section 401(h) apply only to revocations of certificate authority (R. 1109).

The court's opinion did not comment upon petitioner's contention that the Board should have received and considered evidence as to whether petitioner's activities were responsive to a public need. The court denied (R. 1143) the petition for rehearing (R. 1111) which was addressed to that issue.

ARGUMENT

1. The regulation which was in effect when petitioner obtained its Letter of Registration plainly precluded irregular carriers from offering or providing service between designated points on a regular or reasonably regular basis. By way of further definition, it stated that the service offered or provided must be "of such infrequency as to preclude an implication of a uniform pattern or normal consistency of operation . . ."[3] See, *supra*, p. 4.

Petitioner was charged with willful violation of that regulation (R. 71). Its answer to the Order to Show Cause plainly recognized that the issue presented was whether petitioner "held out and is holding out to the public expressly and by course of conduct that it operates aircraft frequently or regularly or with a reasonable degree of regularity between the point Anchorage, Alaska and the point Seattle, Washington" (R. 73). The issue of viola-

[3] The problem of drawing a restraining line for the irregular carrier was not a pressing one prior to World War II, because the early carriers flying under exemption were engaged largely in specialized activities such as aerial photography, flight instruction, crop-dusting, plane servicing, and the like. See *Investigation of Nonscheduled Air Services*, 6 C.A.B. 1049, 1051 (1946). The limited transportation services provided by these carriers were generally furnished in the same small aircraft used for their other aeronautical activities and consisted of sporadic "air-taxi" and "charter" flights.

After World War II, the irregulars began to employ large transport-type aircraft on an increasing scale. The criteria reflected in the 1947 regulations were actually evolved prior to adoption of that regulation. See *Investigation of Nonscheduled Air Services*, *supra*, at 1053, 1055; also, the Board's cease and desist order issued in *Matter of the Non-Certificated Operations of the Caribbean Air Cargo Lines, Inc.*, C.A.B. Docket No. 2593, Order Serial No. E-370 (March 14, 1947).

tion has been resolved against petitioner on the basis of evidence and findings which have been held by the Court of Appeals to provide full support.[4] Clearly, this evidentiary issue presents no occasion for exercise of this Court's certiorari jurisdiction.[5]

Petitioner has sought to raise certain questions which are not in fact presented by the case. In its questions 1-3 (Pet., pp. 3-4), it assumes that the Board determined violation by applying standards which were not in effect when petitioner obtained its Letter of Registration. As the Court of Appeals pointed out (R. 1108), petitioner argues as if the 1948 interpretation of the regulation and the 1949 revision put a new standard or test into effect. The 1948 regulation, however, did not alter or contract the privileges of the exempt carrier. It aimed simply at providing guidance to the industry. The 1949 regulation, while it has had the effect of requiring petitioner to file a new application for exemption, "did not establish new criteria for deter-

[4] Petitioner states (Pet., p. 10) that the Court of Appeals erred in "affirming the Board's holding that flights to Paine Field [at Everett, Washington] and Boeing Field [at Seattle], which are 26 miles apart, were flights to the same point." The court actually held that the practice of providing service to Seattle through the use of Paine Field constituted a holding out of service to Seattle (R. 1107). Furthermore, the decisions of the Court of Appeals and of the Board rested on operations and activities other than those relating to flights to and from Paine Field (*ibid.*).

[5] Petitioner has not presented here its contention, advanced below, that the Board's standard of regularity is void for vagueness. The Court of Appeals for the Second Circuit, as well as the court below (R. 1105-6), has held the standard to be legally enforceable. *Civil Aeronautics Board* v. *Modern Air Transport*, 179 F. 2d 622 (C.A. 2).

mining whether flights are irregular and infrequent" (*ibid.*). The Board and the Court of Appeals determined the issue of violation solely on the basis of requirements which have been continuously in effect during the entire period of petitioner's operations. There was accordingly no occasion for the Board or the Court of Appeals to reach the abstract question—What procedures would the Board be required to follow preliminary to adopting new standards for the governance of irregular carriers? There is likewise no basis for this Court to reach that question in this case.

2. Petitioner claims that the following steps must precede institution of proceedings to revoke a Letter of Registration: (1) issuance of a formal notice of violation by the Board itself (as distinct from the Board's Office of Enforcement); (2) a hearing on the charge of violation culminating in a cease and desist order; (3) an opportunity to achieve compliance. It rests these contentions on Section 9(b) of the Administrative Procedure Act and Section 401(h) of the Civil Aeronautics Act.

Section 9(b) contains the provision that before a license shall be revoked, the licensee shall be given warning and accorded an opportunity to achieve compliance. The sentence containing this provision, however, begins with the words, "Except in cases of willfulness . . ." (see *infra*, p. 15). Since the violation here was charged and found to be willful, this provision of Section 9(b) has no application.

The Court of Appeals did not hold, as petitioner

states (Pet., p. 9), that the letters from the Board's Office of Enforcement, prior to the institution of the revocation proceedings, constituted adequate warning from the agency within the meaning of Section 9(b). It held simply that Section 9(b) was inapplicable (R. 1109).[6]

Section 401(h) of the Civil Aeronautics Act similarly provides that, in order to revoke a certificate of public convenience and necessity, the Board must first determine that there has been a violation of law and then command the certificate holder to bring itself into compliance. Only if there is a failure to obey within a reasonable time thereafter may the certificate be taken up.

Petitioner argues that the above procedure should have been followed in the instant case. The short answer is that petitioner is not a certificate holder. Plainly, an exemption from the requirement that a certificate be obtained is not the equivalent of a certificate. To acquire a certificate, an applicant must demonstrate that the services which it proposes to render are required by the public convenience and necessity, and that it is fit, willing and able to furnish them. Sec. 401(d). Once a certificate is obtained, the holder is required to render adequate service and to discharge all of the other responsibilities incident to the conduct of public service enterprises. Letters of Registration, on the other hand, were issued upon the filing of a

[6] The court correctly regarded the letters and the replies thereto as relevant to the factual issue of willfulness. See R. 1109-1110. As to the element of willfulness, see also R. 285, 290-291; cf. R. 236.

pro forma application (R. 365), without any requirement of a showing of public convenience and necessity or of operating ability. The holders of such Letters are under no duty to render adequate service or, for that matter, any service at all. In granting a special degree of protection to the certificate holder, Congress gave recognition to the fact that the certificated carrier has special responsibilities. The Court of Appeals was plainly correct in holding that Section 401(h) does not cover irregular carriers operating by virtue of an exemption from the certificate provisions.[7]

An analogous question was recently presented to this Court in *Kornfeind* v. *United States,* No. 321, this Term. In that case, the holder of a motor carrier certificate had leased its rights pursuant to authorization by the Interstate Commerce Commission. The lessor subsequently brought a proceeding before the Commission to terminate the lease on the ground that the lessee had violated a provision of the Commission's transfer rules and a paragraph of the lease incorporating that provision. Finding the violation, the Commission terminated the lessee's rights. The lessee thereupon sued to set aside the Commission order on the ground, *inter alia,* that Section 212(a) of the Interstate Commerce Act (the section relating to revocation of certificates of public convenience and

[7] To like effect, see the court's earlier holding in *Standard Air Lines* v. *Civil Aeronautics Board,* 177 F. 2d 18 (C.A.D.C.). The suggestion (see Pet., p. 21) that the Board has generally issued cease and desist orders prior to instituting proceedings to revoke exemption authority is erroneous (R. 40, fn.).

necessity) entitled him to an opportunity to correct the deficiency. The Commission urged that the statutory procedures relating to revocation of a certificate are not applicable to termination of a lease of a certificate. A three-judge district court upheld the Commission's order (N.D. Ill., Civ. No. 50 C 383, May 26, 1952) and this Court affirmed the judgment *per curiam* (73 S. Ct. 104, Oct. 27, 1952).

3. Petitioner urges (Pet., pp. 15-20) that the Board should have received and considered evidence as to whether petitioner's operations were responsive to a public need. It also takes the view that it was entitled to show that there are good reasons for formulating and applying special standards to operations from and to Alaska. The thrust of the argument is that petitioner's evidence on these points might have warranted the Board in concluding that petitioner's activities should be sanctioned.

The Board's regulation plainly applies to all operations by irregular carriers, including operations between Anchorage and Seattle (R. 393-5). Petitioner is arguing, in effect, that in a proceeding to determine whether there has been a willful violation of an existing valid regulation, the party charged with the prohibited conduct is entitled to put in a case designed to show that the regulation was unwise as a matter of policy. It is submitted that the contention is plainly without merit, as shown by the action of the court below in denying the petition for rehearing based on that ground.

CONCLUSION

The decision below is correct, there is no conflict of decisions, and no substantial question warranting review by this Court is presented. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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JANUARY, 1953.

APPENDIX

The relevant provisions of the Administrative Procedure Act (60 Stat. 237, 5 U.S.C. 1001 *et seq.*) are:

SANCTIONS AND POWERS

Sec. 9——

(b) LICENSES.— * * * Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, no withdrawal, suspension, revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements. * * *

The relevant provisions of the Civil Aeronautics Act of 1938, as amended (52 Stat. 973, 49 U.S.C. 401 *et seq.*) are:

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

Certificate Required

Sec. 401. (a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Authority [Board] authorizing such air carrier to engage in such transportation: * * *

* * * * *

Issuance of Certificate

(d)(1) The Authority [Board] shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the Authority [Board] hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied.

(2) In the case of an application for a certificate to engage in temporary air transportation, the Authority [Board] may issue a certificate authorizing the whole or any part thereof for such limited periods as may be required by the public convenience and necessity, if it finds that the applicant is fit, willing, and able properly to perform such transportation and to conform to the provisions of this Act and the rules, regulations, and requirements of the Authority [Board] hereunder.

* * * * *

Authority to Modify, Suspend, or Revoke

(h) The Authority [Board], upon petition or complaint or upon its own initiative, after notice and hearing, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this title or any order, rule, or regulation issued hereunder or any term, condition, or limitation of

such certificate: *Provided,* That no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Authority [Board], with an order of the Authority [Board] commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Authority [Board] to have been violated. Any interested person may file with the Authority [Board] a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of a certificate.

* * * * *

CLASSIFICATION AND EXEMPTION OF CARRIERS

Classification

SEC. 416. (a) The Authority [Board] may from time to time establish such just and reasonable classifications or groups of air carriers for the purposes of this title as the nature of the services performed by such air carriers shall require; and such just and reasonable rules, and regulations, pursuant to and consistent with the provisions of this title, to be observed by each such class or group, as the Authority [Board] finds necessary in the public interest.

Exemptions

(b)(1) The Authority [Board], from time to time and to the extent necessary, may (except as provided in paragraph (2) of this subsection) exempt from the requirements of this title or any

provision thereof, or any rule, regulation, term, condition, or limitation prescribed thereunder, any air carrier or class of air carriers, if it finds that the enforcement of this title or such provision, or such rule, regulation, term, condition, or limitation is or would be an undue burden on such air carrier or class of air carriers by reason of the limited extent of, or unusual circumstances affecting, the operations of such air carrier or class of air carriers and is not in the public interest.

* * * * *

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 465

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Petitioner,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY TO BRIEF OF RESPONDENT IN OPPOSITION

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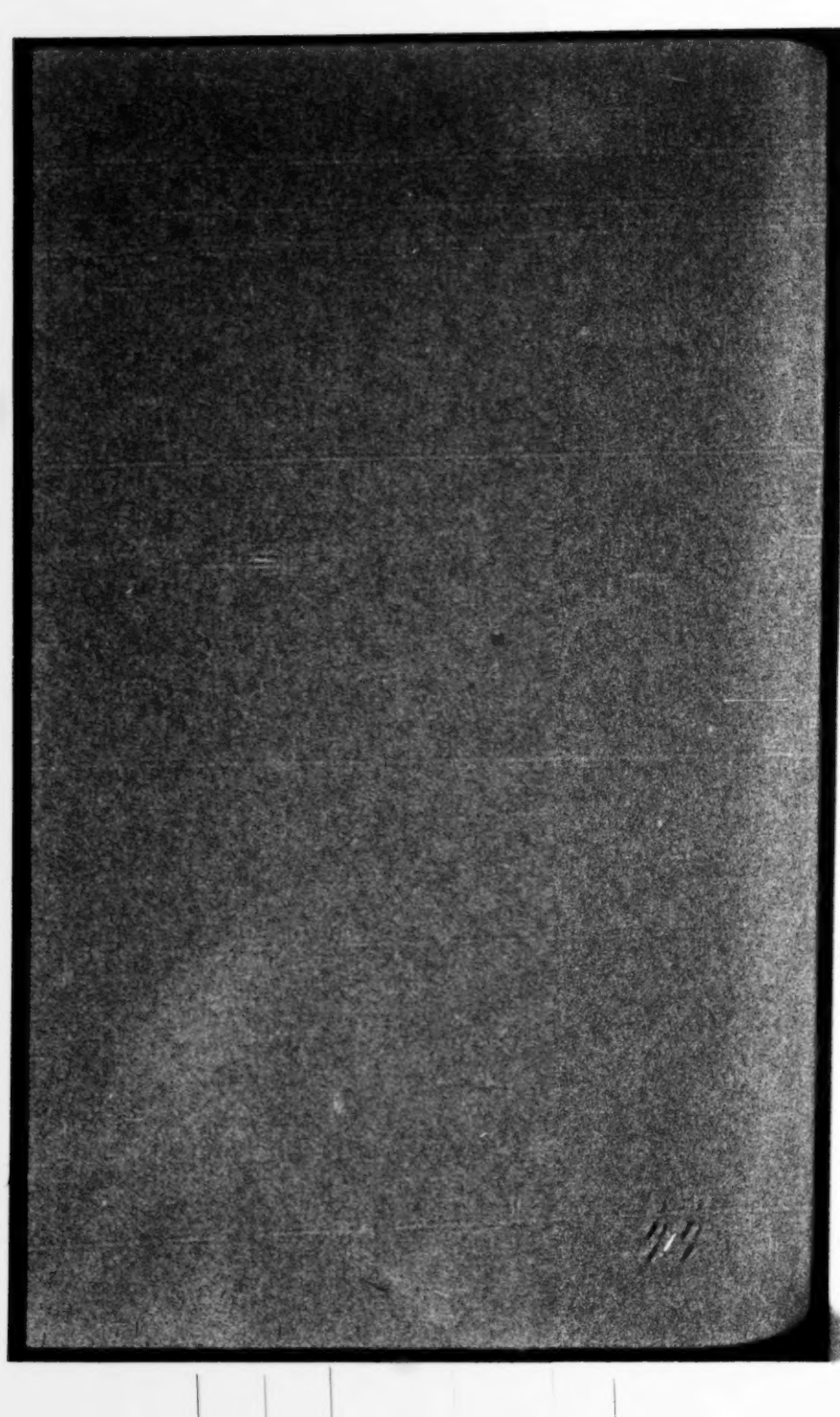

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